91-1000

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1991

RICHARD CLEVELAND CROOK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN WESLEY HALL, JR.
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December 17, 1991

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QUESTIONS PRESENTED FOR REVIEW

I.

When the accused contradicts nearly every essential fact in the officer's affidavit necessary to the finding of probable cause to the place to be searched through the informant's testimony, and he is even acquitted of the count based on that "factual" allegation, the accused has made a sufficient showing of falsity or reckless disregard for the truth under *Franks v. Delaware* to suppress the search under the Fourth Amendment.

TABLE OF CONTENTS

Questions Presented 1

Table of Contents 3

Table of Authorities 4

Opinion Below 5

Jurisdiction 6

Constitutional Provisions Involved 6

Statement of the Case 6

Reasons for Granting the Writ 10

The decision below is contrary to *Franks v. Delaware;* the *Franks* doctrine is moribund, so Court should grant certiorari to breathe life back into it.

Conclusion 13

Appendix A1

United States v. Crook,
936 F.2d 1012 (8th Cir.1991) A3

TABLE OF AUTHORITIES

CASES:

Franks v. Delaware, 438 U.S. 154 (1978) 1,7,8,10,11,12

United States v. A Residence Located at 218 3rd Street, New Clarus, Wisc., 805 F.2d 256 (7th Cir.1986) 12

United States v. Baker, 907 F.2d 53 (8th Cir.1990) 7

United States v. Crook, 936 F.2d 1012 (8th Cir.1991) 3,5,8

United States v. Johns, 851 F.2d 1131 (9th Cir.1988) 12

United States v. Lee, 743 F.2d 1240 (8th Cir.1984) 7

United States v. Leon, 468 U.S. 897 (1984) 10

United States v. Luschen, 614 F.2d 1164 (8th Cir.1980) 7

United States v. Obregon, 893 F.2d 1307 (11th Cir.1990) 7

CONSTITUTIONAL PROVISIONS:

Fourth Amendment, U.S. Constitution 1,6,12

Fourteenth Amendment, § 1, U.S. Constitution 6

STATUTES:

21 U.S.C. § 841(a)(1) 6

28 U.S.C. § 1254(1) 6

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UNITED STATES OF AMERICA,
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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was rendered on June 26, 1991. It is reported as *United States v. Crook,* 936 F.2d 1012 (8th Cir.1991), and it appears in the Appendix at A-3. The Eighth Circuit denied rehearing and the suggestion for rehearing en banc on August 9, 1991. A-11.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit decided this case on June 26, 1991. Petitioner's petition for rehearing was denied on August 9, 1991. Justice Blackmun granted petitioner's application to extend the time for filing this petition to December 17, 1991. This Petition for Writ of Certiorari is, therefore, timely.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the U.S. Constitution provides in § 1 that:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law, ...

STATEMENT OF THE CASE

Petitioner was indicted March 19, 1990 for possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He was also indicted for

distribution of methamphetamine.

The case against petitioner depended on the testimony of an informant. The informant was the government's witness on the distribution charge. The informant was the government's source of information for a search warrant of petitioner's mobile home in Pulaski County, Arkansas. The informant was located, and he testified at trial. According to the split verdict, he was less than credible. The informant testified to a series of events occurring during an alleged drug buy where he was "wired" and being listened to by narcotics officers. The informant contradicted the affidavit for the search warrant of petitioner's mobile home in every material respect.[1]

In mid-trial,[2] petitioner moved for a mistrial and suppression hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), since the trial testimony completely undercut the basis for the probable cause for the search. Esssen-

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[1] Petitioner was not able to file a *Franks* motion prior to trial because the government did not disclose the informant until the eve of trial, and the informant could not be located to be interviewed. Thus, petitioner did not learn of the informant's contradictions of the affidavit until trial.

[2] The timing of the *Franks* challenge in this case was not an issue in the Court of Appeals, and it should not be here. Generally, a *Franks* challenge can be made mid- or even post-trial if that is when the accused first can articulate the "substantial (preliminary) showing." *See, e.g., United States v. Baker*, 907 F.2d 53 (8th Cir. 1990); *United States v. Obregon*, 893 F.2d 1307 (11th Cir.1990); *United States v. Lee*, 743 F.2d 1240 (8th Cir.1984); *United States v. Luschen*, 614 F.2d 1164 (8th Cir.1980).

tially, the informant's version of the events was so far different from the officer's version that it appeared that the officer had to have either knowingly or recklessly provided false information to the magistrate. The informant contradicted the officer on the statement that the drug deal took place in petitioner's home (hence, the search of the home), that petitioner took the informant across the street to do the drug deal, that petitioner weighed out the drugs sold to the informant, and that petitioner received money for the drugs. The trial court denied the motion, and the trial proceeded.

Significantly, petitioner was acquitted of the distribution count involving the wired informant, but he was convicted of the possession count which depended entirely on the informant's testimony. The district court sentenced him to the minimum under the Sentencing Guidelines: 63 months. The district court was concerned enough about the issue here to permit him to remain free pending appeal. Judgment at 2 (Sept. 26, 1990).

On appeal to the United States Court of Appeals for the Eighth Circuit, the conviction was affirmed. *United States v. Crook,* 936 F.2d 1012 (8th Cir.1991) (reprinted in the Appendix at A-3). The Eighth Circuit held that even if the contested statements were removed from the affidavit, "the basic facts alleged in the warrant affidavit--that Crook sold methamphetamine to [the informant] and that the drugs were obtained from the trailer--are not contested." Thus, the *Franks* challenge failed. *Id.* at A-7. The conviction was thus affirmed. To the contrary, petitioner strenously contested that fact as either a fabrication by the officer or a statement or assumption recklessly made without any basis in fact.

Petitioner filed a petition for rehearing before the panel and suggested rehearing en banc. This was denied on August 9, 1991.

Release pending the filing of this petition was denied by the district court on September 6, 1991. The petitioner applied to the Eighth Circuit that same day, but the Eighth Circuit did not act on it to deny it until Novembr 18, 1991. In the interim, petitioner applied to Justice Blackmun who denied it November 15, 1991. Application No. A-351.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS CONTRARY TO *FRANKS v. DELAWARE;* THE *FRANKS* DOCTRINE IS MORIBUND, SO COURT SHOULD GRANT CERTIORARI TO BREATHE LIFE BACK INTO IT.

A.

In 1978, this Court held in *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978), that

> where the accused makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

An offer of proof of falsity or reckless disregard is required. *Id.* at 171. If such a showing is made and the challenged information is excluded from the affidavit, the remaining information must provide probable cause for the search to be valid. *Id.* at 171-72.

The *Franks* doctrine is an important milestone on the road of Fourth Amendment jurisprudence. It has not been subject to much discussion, but its importance cannot be denied. In *United States v. Leon,* 468 U.S. 897, 914 (1984), this Court held that a *Franks* violation vitiated good faith.

B.

Despite its importance, the *Franks* doctrine in practice has proved to be only a deterrent at best--sort of like a "Beware of Dog" sign on a fence around a house where the dog in the house is deaf, blind, toothless, and moribund. Once an intruder is inside the fence, he can carry away the contents of the house with impunity.

In practice, the *Franks* doctrine has proved impossible to meet, and the courts have erected nearly insurmountable burdens on the accused. Of the hundreds of cases to discuss *Franks*, only a handful have held that the accused could satisfy the "substantial preliminary showing" requirement. even if they did, the accused almost always loses. As this case demonstrates, the accused can show through testimony that the officer must have either knowingly or recklessly provided false information critical to the finding of probable cause, yet the accused can never overcome the presumption of validity of the warrant.

It seems incredible that the showing made here is insufficient to support a *Franks* challenge where the informant testifies to a scenario that proves only two possible propositions: (1) either he is lying at trial or (2) the officer was lying or reckless when he swore to the affidavit. Yet, the Eighth Circuit casts aside petitioner's showing as being insufficient. Petitioner's contention cannot be so cavalierly ignored because the informant's testimony certainly gave the jury cause for concern since it acquitted petitioner of the count which depended upon the very facts alleged in the affidavit for the warrant application that the informant contradicted.

In sum, when the accused contradicts every essential fact in the officer's affidavit necessary to the finding of

probable cause to the place to be searched through the informant's testimony, the accused has made a sufficient showing of falsity or reckless disregard for the truth under *Franks v. Delaware* to suppress the search. The decision below thus is contrary to *Franks*.

C.

Petitioner further submits that the decision below is contrary to one of the few cases actually granting a *Franks* hearing; *United States v. Johns*, 851 F.2d 1131, 1134 (9th Cir.1988); and another case denying a *Franks* challenge on merits but holding that *Franks* was met by inference. *United States v. A Residence Located at 218 3rd Street, New Clarus, Wisc.*, 805 F.2d 256, 258 (7th Cir.1986). In this case, petitioner clearly met the standard contemplated by *Franks* but never recognized in practice. Frankly, petitioner wishes that he could cite more cases, but, since no accused can ever seem to satisfy the *Franks* standard in practice, there just are not that many cases to cite.

D.

Petitioner was victimized by the police in this case. It seems incredible that the informant could contradict the affidavit for the warrant in every material way, the jury acquit him of the very count depending upon the affidavit for the search warrant, and then the Court of Appeals hold that he did not satisfy the *Franks* standard.

The Fourth Amendment truly has become the victim of the War on drugs."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 17, 1991

APPENDIX

TABLE OF CONTENTS

Table of Contents	A-1
Opinion of June 26, 1991	A-3
Order denying rehearing August 9, 1991	A-10

United States Court of Appeals
For the Eighth Circuit

No. 90-2686

UNITED STATES OF AMERICA,	*	
	*	Appeal from
Appellee,	*	the United
	*	States District
v.	*	Court for
	*	the Eastern
RICHARD CLEVELAND CROOK,	*	District of
	*	Arkansas.
Appellant.	*	

Submitted: April 9, 1991
Filed: June 26, 1991

Before MCMILLAN, Circuit Judge, PECK,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PECK, Senior Circuit Judge.

Appellant, Richard Crook appeals from a judgment

* The Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit Court of Appeals sitting by designation.

in the district court[1] for possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §841(a)(1). Crook contends that the district court erred in denying his motion for a mid-trial *Franks* hearing and allowing the Government to introduce into evidence a videotape of a prior unrelated drug transaction. For the reasons stated below, we affirm.

I. BACKGROUND

On December 13, 1989, Ken Duckworth, a confidential informant, went to Appellant Richard Crook's trailer to make a controlled purchase of methamphetamine. Duckworth wore a body transmitter during the encounter. Because Crook's trailer was near the end of a dead-end lane, the surveilling police officers had to park their car a good distance away from the site to avoid detection. Reception from the body transmitter was poor. After Duckworth returned from Crook's residence, he was interviewed by Investigator Robert Gibbs. Shortly thereafter, Gibbs executed an affidavit of probable cause to obtain a search warrant for Crook's residence. The affidavit stated that Gibbs had overheard a male question Duckworth about wearing a surveillance microphone, a discussion about the purchase of an ounce of methamphetamine, and the counting of money for the purchase underway. Additionally, the affidavit stated that Duckworth had told Gibbs that Crook met him upon arrival, produced two bags of drugs from his pocket, and took Duckworth to a small frame house across the street from the trailer to weigh the drugs.

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[1] The Honorable Henry Woods, District Judge, United States District Court for the Eastern District of Arkansas.

On the basis of the affidavit, a search warrant was executed. Among the items seized from the master bedroom and bathroom of Crook's trailer were 294 grams of methamphetamine, a scale, a box of baggies, and $800 including $530 of the $550 that had been provided to Duckworth for the earlier drug purchase.

Crook was indicted on March 19, 1990 for one count of distribution of methamphetamine and one count of possession of methamphetamine with intent to distribute. At the trial, it became apparent that much of the tape made from Duckworth's body transmitter was unintelligible. Additionally, Duckworth testified that he did not tell Gibbs about going to the frame house to weigh the drugs and then returning to the trailer to consummate the urchase. Defense counsel made a motion for a *Franks* hearing on the grounds that Duckworth's testimony showed that the affidavit for the search warrant contained false information. The trial court denied the motion. Additionally, over a defense objection, the Government introduced into evidence a videotape of an earlier, unrelated drug transaction for the purpose of showing Crook's knowledge. Crook contended that the person in the videotape was not he, but his brother. Crook was convicted of one count of possession with intent to distribute methamphetamine. He was sentenced to 63 months in prison. He appealed the conviction to this court.

II. *FRANKS* HEARING

On appeal, Crook contends that the district court erred in denying his motion for a *Franks* hearing. The Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

The Court stated further that there is a presumption of validity with respect to the affidavit supporting the search warrant. *Id.* at 171. Allegations of deliberate falsehood or reckless disregard must be accompanied by an offer of proof. *Id.* Allegations of negligence or innocent mistake are not sufficient. *Id.* Furthermore, if after setting aside the contested allegations, there is sufficient content in the affidavit to support a finding of probable cause, no hearing is required. *Id.* at 171-72.

This Court has stated that the substantiality requirement for a *Franks* hearing is not lightly met. *United States v. Wajda*, 810 F.2d 754, 759 (8th Cir.), *cert. denied*, 481 U.S. 1040 (1987). Even where defendants have clearly identified the allegedly false portions of the warrant affidavit and provided affidavits as to their falsity, this court has upheld the denial of a *Franks* hearing where the defendant has failed to offer proof of the affiant's recklessness or deliberate falsehood. *United States v. Streete*, 907 F.2d 781, 788 (8th Cir. 1990) (defendant's claim inadequate due to lack of proof of affiant's recklessness or deliberate falsehood which would raise allegations above a claim of negligence); *United States v. Bulgatz*, 693 F.2d 728, 732 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210

(1983) (because defendant failed to offer proof that the misstatement in the affidavit was reckless or deliberate, conditions for a *Franks* hearing were not met).

In the present case, Crook has made no offer of proof as to Investigator Gibbs' alleged intentional falsity or reckless disregard for a *Franks* hearing. Even if Crook had made such a showing, the contested statements concern details of the drug transaction, such as whether Crook met Duckworth immediately upon arrival, whether Crook questioned Duckworth about wearing a body transmitter, whether the transaction took place in the trailer or the frame house, etc. Despite these discrepancies, the basic facts alleged in the warrant affidavit--that Crook sold methamphetamine to Duckworth and that the drugs were obtained from the trailer--are not contested. Thus, even after omitting the contested statements, the warrant affidavit contains sufficient facts to establish probable cause for the search of the trailer. Accordingly, we conclude that the district court did not err in denying Crook's motion for a *Franks* hearing.

III. ADMISSION OF THE VIDEOTAPE

Federal Rule of Evidence 404(b) prohibits the admission of evidence of other crimes, wrongs, or bad acts to prove the character of a person and action in conformity therewith. However, it is admissible to prove knowledge, intent, motive, etc. Crook argues that the district court erred in admitting the videotape of the prior unrelated drug transaction because his participation in the previous transaction was not proved by clear and convincing evidence. He steadfastly contends that the individual in the tape is one of his brothers, not he. Crook presented witnesses

from his family who corroborated his contention that the person in the videotape was one of Crook's brothers.

Although in the past the Eighth Circuit required evidence of proof bad acts to meet a clear and convincing standard, the present requirements for admission of such evidence are:

> (1) the evidence is relevant to a material issue; (2) the prior bad acts are similar in kind and reasonably close in time to the crime charged; (3) there is sufficient evidence to support a finding by the jury that the defendant committed the prior acts; and (4) the potential prejudice of the evidence does not substantially outweigh its probative value.

United States v. Burk, 912 F.2d 225, 228 (8th Cir. 1990) (citations omitted). Furthermore, FRE 404(b) is viewed as a rule of inclusion which allows the admission of evidence unless it tends only to prove the defendant's criminal disposition. *Id.* Finally, the trial court has broad discretion in admitting such evidence and this court will disturb the ruling only if the defendant shows that the proof clearly has no bearing on any relevant issue. *Id.*

In the present case, Crook's defense consisted of denials that he had any knowledge of the items seized from his residence. The Government introduced the videotape on the issue of knowledge after Crook had presented his defense. Thus, the evidence was relevant to an issue in the case. The second requirement is met because the videotaped drug transaction is clearly similar to the crime charged and took place only nine months prior to it. With

regard to the sufficiency of the evidence, the jury viewed the videotape, but also heard evidence on surrebuttal from three of Crook's relatives that the individual in the tape was not the defendant. There is nothing in the record to indicate that the videotape was of poor quality or had any defect that would impede the jury's ability to discern the identity of the people in the tape. Thus, the evidence was sufficient for the jury to determine whether Crook was the individual in the tape. Finally, it is unlikely that Crook was unduly prejudiced by the admission of the tape. The district judge viewed the tape *in camera* prior to admitting it. He found that the tape was authentic and that the individual filmed appeared to be Crook. Additionally, the judge gave a limiting instruction cautioning the jury that the videotape was admitted only on the issue of knowledge.

We conclude that the requirements for the admission of FRE 404(b) evidence have been met here. Accordingly, we affirm.

A true copy.

Attest: Clerk, U.S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit

No. 90-2686

UNITED STATES OF AMERICA,	*	
	*	Order Denying
Appellee,	*	Petition for
	*	Rehearing and
v.	*	Suggestion for
	*	Rehearing En
RICHARD CLEVELAND CROOK,	*	Banc
	*	
Appellant.	*	

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

August 9, 1991

Order Entered at the Direction of the Court: Michael E. Gans, Clerk, U.S. Court of Appeals, Eighth Circuit.